

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals

Panel: Whitbeck, P.J., and Smolenski and Cooper, JJ.

PAUL DRESSEL and
THERESA DRESSEL,

Plaintiffs-Appellees,

v.

AMERIBANK,

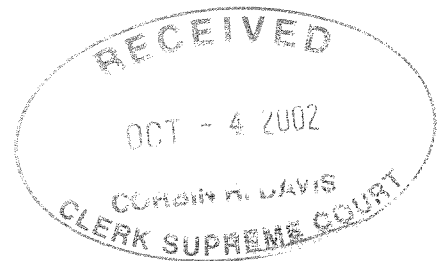
Defendant-Appellant.

Supreme Court Case No. 119959

Court of Appeals Case No. 222447

Kent County Circuit Court
Lower Court No. 98-013017-CP

BRIEF AMICUS CURIAE OF THE
CALHOUN COUNTY BAR ASSOCIATION



Mark F. Stuart (P21111)
STUART LAW OFFICES, PC
121½ West Michigan Avenue
Suite A
Marshall, MI 49068-1521
(616) 781-3928

CALHOUN COUNTY BAR ASSOCIATION

The Calhoun County Bar Association is a nonprofit association of lawyers practicing in Calhoun County. Calhoun County includes Battle Creek, Marshall and Albion, as well as a number of smaller towns and villages. The Bar Association counts among its numbers many small firm and solo practitioners who make their living as general practitioners, protecting the rights and interests of Michigan citizens in a variety of contexts, including mortgage transactions. Undersigned counsel for the Bar Association serves on the State Bar of Michigan's Unauthorized Practice of Law Committee and is frequent liaison between the Calhoun County and State Bars on issues concerning unauthorized practice.

The Calhoun County Bar Association files this Brief in hopes it will foster the Court's understanding of how the Michigan statutes operate to empower legal practitioners to assist Michigan citizens through their unique franchise to engage in the "law business," and how permitting others to encroach upon that franchise would frustrate both the letter and spirit of those statutes and work to the detriment of Michigan citizens and the Michigan Bar.

A. THE UNAUTHORIZED PRACTICE OF LAWS STATUTES AND THE LAW BUSINESS

Michigan has enacted two statutes forbidding the unauthorized practice of law. In 1911, the Michigan Legislature enacted PA 1911, No. 232, §1, the precursor to MCL 600.916. In 1917, the Legislature enacted PA 1917, No. 354, §1, the precursor to MCL 450.681. This second statute clarified the prohibition against the practice of law as related to corporations and voluntary associations.

In 1919, the original 1911 "UPL" Legislation was amended to add to the general prohibition against the practice of law a phrase prohibiting non-lawyers "to practice law or engage in the law business" (emphasis added). PA 1919, No. 314, p.552. Thus, by 1919, both statutes contained two

express prohibitions: one against practicing law and a second against being in the business of the law.¹

Although both statutes have been amended since the 1910's, these critical provisions have remained intact.

“Practicing law” means something different in the context of those statutes than engaging in the “law business.” This Court has consistently stated that statutes must be interpreted to give meaning to each word, and avoid constrictions which would render any part surplusage. Wickens v Oakwood Healthcare System, 465 Mich 53 (2001); Brown v Genessee County Board of Commissioners, 464 Mich 430 (2001); People v Warren, 462 Mich 415 (2000). Interpretations that render some or all of a statute whimsical, arbitrary or nugatory are to be avoided. Wyandotte Savings Bank v Eveland, 347 Mich 33; 78 NW2d 612 (1956).

This Court recognized the important distinction between simply “practicing law” (which may under some circumstances be authorized even when accomplished by a non-lawyer) and engaging in “the law business” in Ingham County Bar Assn. v Walter Neller & Co., 342 Mich 214 (1955), when it invoked and then followed the rule adopted in Missouri, a state which, like Michigan, forbade separately both “the practice of law” and “do[ing] law business,” unless “duly licensed.” RS Mo 484.020. This Court wrote about the Missouri opinion:

One such [majority rule] case is the recent case of Hulse v Criger, 363 Mo 26 (247 SW2d 855) (1952), in which the defendant realtor, executed conveyancing forms in connection with transactions in which he was a broker, he, however, making a separate charge therefor. In proscribing the charge therefor but not the practice of executing the forms, the court said (p.44):

“Likewise, general warranty deed and trust deed forms are so standardized that to complete them for usual transactions requires only ordinary intelligence rather than legal training. They are in fact less complicated than contracts for sale of real estate. We know that

¹ Other activity, including holding oneself out to be able to practice laws, is also prohibited.

these forms are furnished to the public at offices of recorders of deeds through the State. We think the preparation of these instruments in closing transactions in which a real-estate broker is acting as broker is so closely related to the transaction and the business of the broker as to be practically a part of it and that he is not engaging in unlawful practice of law to prepare them under such circumstances. The same thing is true of ordinary short term leases, notes, chattel mortgages and trust deeds in transactions which the broker procures.”

We believe that the determining point is set forth in the further statement of the Missouri court, when it said (p.45):

“We think the guiding principle must be whether under the circumstances the preparation of the papers involved is the business being carried on or whether this really is ancillary to and an essential part of another business.”

Ingham County Bar Assn. v Walter Neller, 342 Mich at 224–225 [emphasis supplied]. The Walter Neller opinion explains, again using the words of the Hulse v Criger opinion, how the realtor’s real personal interest in the underlying transaction means that his practice of law is not “unauthorized,” so long as he does not charge a fee. Ingham County Bar Assn. at 225 – 229. If you charge a fee you are doing law business.

This result not only makes sense, it is mandated by the plain language of both the Michigan and Missouri statutes, which prohibit separately and apart from the practice of law engagement in the “business” of law² Beyond argument, a lawyer who prepares conveyances (a term which according to Black’s includes mortgages) and charges a fee for doing so is engaged in the “law business.”³ In fact, it is part of the daily business of many of the constituents of the Calhoun County Bar Association. It cannot be credibly asserted that a bank is not engaged in the “law business” when it does what lawyers

² Black’s Law Dictionary defines “business” as “Employment, occupation, profession, or commercial activity engaged in for gain or livelihood. Activity or enterprise for gain, benefit, advantage, or livelihood.”

³ Is the Court prepared to say that a lawyer who makes an error in filling out a legal form does not commit malpractice?

do and charge for. In fact, AmeriBank's charge of \$400 exceeds vastly the going rate of many of the Calhoun County Bar Association's constituents, who can prepare a complete set of closing documents for less.

Michigan and Missouri are not alone in making separate proscriptions against participating in the business of law. In all, sixteen states have exacted legislation or promulgated rules which either forbid non-lawyers from "law business" or from assessing a fee for the preparation of documents affecting secular interests.

ALASKA: Rule 63 of the Rules of the Alaska Bar Association (promulgated by the Alaska Supreme Court forbids preparing for "compensation" "documents for another which affect legal rights or duties."

CONNECTICUT: Ct Stat §51 — 88 forbids non-lawyers to "make it a business to practice law."

GEORGIA: GA Code Ann. §15-19-51 provides that it is unlawful for a non-attorney:

(2) To make it a business to practice as an attorney at law for any person other than himself in any of such courts...

ILLINOIS: 705 ILCS 205/I provides in §1 that "No person shall receive any compensation directly or indirectly for any legal services other than a regularly licensed attorney...Any person practicing, charging or receiving fees for legal services...without being licensed...is guilty of contempt of court and shall be punished..."

INDIANA: Indiana Code §33-1-5-1 provides "it is a Class B misdemeanor...to engage in the business of a practicing lawyer, without first having been duly admitted..."

KENTUCKY: Supreme Court Rule 3.020 provides:

The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing

any instrument to which he is a party without consideration unto himself therefor.

LOUISIANA: Louisiana Rev. Stat. §37:212 provides that the practice of law includes:

(A)(2) For a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect;

* * *

(b) In behalf of another, the drawing or procuring, or the assisting in the drawing or procuring of a paper, document or instrument affecting to or relating to secular rights.

MAINE: Maine RSA Title IV §807 provides:

1. Prohibition. No person may practice law or profess to practice law within the State or before its courts, or demand or receive any remuneration for those services rendered in this State, unless that person has been admitted to the bar of this State and has complied with section 806-A, or unless that person has been admitted to try cases in the courts of this State under section 802.

MASSACHUSETTS: Section 40 of the Massachusetts General laws forbids both disbarred attorneys and non-attorneys to “receive any fee for his services.”

MINNESOTA: Minnesota has a general prohibition against non-lawyers furnishing any legal service “for a fee or any consideration.” Minn. Stat. §481.02, Subdivision 1. As the Appellees noted in their Brief, however, Minnesota’s law differs from Michigan’s in that it provides an exception to this general rule in the case of notes and mortgages. Minn. Stat. §481.2, Subdivision 3, (8). Michigan has no such exception.

MISSOURI: RS Mo. §484.020 provides:

(1) No person shall engage in the practice of law or do law business...unless...duly licensed.

SOUTH CAROLINA: The Code of Laws of South Carolina §40-5-350 makes it unlawful to solicit . . . legal business.”

TEXAS: Texas Stat. §81.101 defines the “practice of law” to include “the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.” §83.001(2) goes on to provide:

(a) A person, other than a [lawyer], may not charge or receive, either directly or indirectly, any compensation for all or any part of the preparation of a legal instrument affecting title to real property, including a deed, deed of trust, note, mortgage, and transfer or release of lien.

TENNESSEE: TCA §23-3-103(2) provides “No person shall engage in the ‘practice of law’ or do ‘law business,’ or both, as defined in §§23-3-01, unless such person has been duly licensed...” §23-3-01, in turn, defines “law business” to include “the drawing or procuring of or assisting in the drawing for valuable consideration of any paper, document, or instrument affecting or relating to secular rights.”

Obviously, there are some differences among these statutes, but each, like the Michigan statutes, proscribe separately doing legal work for compensation or engaging in “law business.”

Of these 15 states, eight have developed case law which distinguishes the occasionally authorized practice of law from circumstances where a non-lawyer charges a fee. See Neller, *supra*; Hulse, *supra*; Georgia Bar Assn. v Lawyer’s Title Insurance Corp., 151 SE2d 718 (GA 1996); First Federal S&L Assn. v Sadnick, 515 NE2d 1354 (Ill App 1987); Miller v Vance, 463 NE2d 250, 253 (Ind 1984); Federal Intermediate Credit Bank of Louisville v Kentucky Bar Assn., 540 SW2d 14 (Ky 1976) [cannot charge a fee and attorney must review]; Kentucky State Bar Assn. v Tussey, 476 SW2d 177 (Ky 1972); In Re Opinion of Justices, 289 Mass 607 (Mass 1934) [“The occasional drafting of simple deeds or other legal instruments when not concluded as an occupation or yielding substantial income may fall outside the practice of law”]; and Cardinal v Merrill Lynch Realty, 433 NW2d 864 (Minn 1988) [Cardinal, however, was forced to acknowledge the effect of Minnesota’s special exception for mortgages].

Of the seven remaining states, one, South Carolina, refuses to permit non-lawyers to draft legal documents whether or not a fee is assessed (State of South Carolina v Buyers Service Co., 357 SE2d 15 (SC 1987), and the other seven have not addressed the pertinent statutory language in any opinion

the Calhoun County Bar Association has been able to identify.⁴

B. THE ROLE OF THE LAW BUSINESS IN CIVIL SOCIETY

Consider the practical ramifications of the rule of law that the mortgage lending lobby would have this Court endorse from a standpoint of the ordinary Michigan citizen.

Whether buying a new house or refinancing with a new mortgage, the mortgage transaction is the most significant many Michigan citizens will ever encounter. Under a federal law called the Real Estate Settlement Procedures Act (or “RESPA”) mortgage lenders must supply consumers with a document called a “good faith estimate of closing costs” within three (3) days after a mortgage loan application is made. 12 USC §2604(c); 24 CFR §3500.7. Presuming AmeriBank followed the law, the Dressels received a Good Faith Estimate showing that AmeriBank would charge them \$400 to prepare the legal papers for their loan. Informed by the fact that they were already spending \$400 for loan documents, they would have to determine whether it was necessary, prudent, or even affordable to spend additional sums to hire an attorney to look at the documents. Would not the Dressels, as well as most or all other consumers, conclude that they were already paying someone in the law business to prepare legal documents, and that it would simply waste resources to pay someone else in the law business to look them over?⁵ Is not the Bank that represents it will perform this service for \$400 holding itself out as one authorized to engage in this legal work, in violation of both MCL 600.916 and MCL 450.681?

⁴ Of course, many other jurisdictions follow rules of law which forbid the assessment of fees for preparing legal documents notwithstanding the lack of a statutory proscription against doing “law business.” This subject is treated in Appellee’s Brief.

⁵ As the Minnesota Supreme Court held in *Cardinal v Merrill Lynch Realty*, *supra* at 869, “a charge for services usually reflects the parties’ judgment of the value of the services. If a charge is made for the services, it is likely that both the actor and the recipient understand the legal question to be difficult or doubtful.

In fact, the Legislature specifically states in both statutes that it is only the licensed lawyer that may engage in law business or hold herself out as able to engage in the law business. In enforcing this law, the Court does not engage in “turf protection” as several amici have asserted, but effectuating the expressed words and intent of the statutes.

The reasons the Legislature created these restrictions are clear and compelling. They include not only the licensed attorney’s skill and training, but something else no one but the licensed attorney can offer: a solemn oath to serve first the rule of law and second the client. The mortgage lender takes no such oath; indeed AmeriBank here admits that despite taking a \$400 fee, it served no master but itself, and prepared documents designated to protect its interest alone. It is engaging in the business of lawyers, for a fee, with neither a lawyer’s training to assist it nor Rules of Professional Responsibility to trammel it. This is precisely what the legislature forbade.

The practitioners of Calhoun County see on a regular basis the harm wrought when these non-lawyers do law business. Misdrafted and flatly wrong documents are only one of the evils. More common — and more insidious — is the document which fails to protect rights of Michigan citizens because it is one-sided. That citizens should pay for legal documents prepared by a non-lawyer that do not and are not intended to protect their interests is not only *malum prohibitum* due to MCL 450.861 and MCL 600.916, it is a *malum in se*.

C. SELECTING LEGAL FORMS, COMPLETING LEGAL FORMS AND THE EXERCISE OF LEGAL DISCRETION

This Court has repeatedly rejected the suggestion that filling in blanks on legal forms is not the practice of law because no legal discretion is involved. Grand Rapids Bar Assn. v Denkema, 290 Mich 56; 287 NW 377 (1939); Neller, supra; State Bar of Michigan v Kupris, 366 Mich 688; 116 NW2d 341 (1962); State Bar of Michigan v Cramer, 399 Mich 116; 249 NW2d 1 (1976). In so holding, the

Court is in accord with the vast majority of other jurisdictions. Now, the Bank suggests the Court reject this longstanding precedent and make a determination that non-lawyers may fill in legal forms, and charge for it (thus doing “law business”) provided no legal discretion is exercised.

There are serious flaws in this analysis. First, while it is possible to draft a legal document without the exercise of legal discretion, as it is possible to drive a car without knowing how, successfully getting from point A to B is mere coincidence, and the risks attendant to the undertaking are waiting to take their revenge on the next attempt. Any forthright attorney will affirm that preparing a legal document cannot be done properly, and with a level of consistency that protects the public, without the exercise of legal discretion. A holding of this Court that any legal document can be prepared without exercising legal discretion would endanger the public welfare.

Nor does the fact that the legal document is a “form” alter the reality that the drafter must exercise discretion to prepare it properly to minimize the risk to the public.⁶ Indeed, such discretion begins with filling in the blank which identifies the “principal sum” owed by the borrower to the bank. The drafter must determine whether to include in that amount fees the inclusion of which may implicate state or federal law, such as: (1) Discount points where no loan discount is provided (prohibited by common law); (2) Fees for the preparation of the HUD-1 Settlement Statement and the Truth in Lending Disclosure (prohibited by 12 USC § 2610); (3) Fees that exceed the actual expense of providing a service (prohibited by MCL § 445.1673 and by MCL § 438.31a).

Beyond the discretion entailed in filling in the blanks on the form, legal discretion is exercised in determining whether and to what extent prepayment penalties are permitted (see MCL § 438.31c); the propriety of the legal description to be included, the propriety of the forced placed insurance provisions (see Kenty v. Transamerica Premium Insurance Company, 650 NE2d 863 (OH 1995), and

⁶ Even the so-called Fannie Mae Single Family form comes with instructions (attached) that include identification of

most critically, whether a borrower after default may be required to pay in full the accelerated balance in order to cure that default. These decisions can be made without the exercise of legal discretion, but if they are, they will be right only by coincidence.

Moreover, once the court opens the door to the possibility that legal forms can be filled in without necessarily engaging in the practice of law, many others will want to walk through it: the “trust kit” salespeople, the do-it-yourself divorce advocates, and those who would incorporate businesses. The Court cannot on any principled basis open the door for mortgage lenders and expect it to close again for others.

Protection of the public from untrained legal counsel must not be reduced to a game of chance. This Court must preserve the protections afforded the public by our legislature against those who see the law business merely as an opportunity for profit and not a solemn undertaking.

CONCLUSION

This Court has long forbidden the practices AmeriBank and the lending lobby now asks for dispensation from the law. The reasoning behind the Court’s existing precedent is sound, is mandated by the letter of the statutory authority the Court is charged with enforcing, and is consistent with the unanimous authority of the other states with similar legislative schemes.

Respectfully Submitted,

Dated: October 3, 2002



Mark F. Stuart (P21111)
Attorney for Calhoun County Bar Association
121½ West Michigan Avenue, Suite A
Marshall, MI 49068-1521

Mortgage Documents

Michigan - Single Family - Fannie Mac/Freddie Mac UNIFORM INSTRUMENT (Form 3023)

Type of Instrument
Mortgage

Instrument Revision Date
1/01

Instrument Last Modified
9/3/02 (Deletion of SS# Blanks)

Summary Page Last Modified
9/3/02

Printing Instructions

The PDF document must be printed on letter size paper, using portrait format.

Use This Document For

State	Lien Type	Product Type	Property Type	Occupancy Type
MI	First	All	All, except cooperatives	All

Required Changes

The following changes MUST always be made to this document:

None

Authorized Changes

The following changes MAY be made to this document at the lender's option or MUST be made under certain circumstances only:

1. Lenders MAY add legends to identify the preparers of the document, consistent with the requirements of state and local laws.
2. Although not required, lenders MAY include at the bottom of each page "initial lines" on which borrowers may insert their initials to acknowledge that all pages of the document are present. If lines are provided for initials, the originator is not required to have borrowers initial the document, but if the borrower initials the document, the originator must require that the borrower initial each and every page as indicated.
3. Lenders MAY insert the appropriate acknowledgment in the blank space after the signature lines as documents for individual mortgages are prepared or MAY print documents bearing the appropriate acknowledgment(s) in advance for use as the need arises.
4. Lenders MAY adjust cross-references to section, paragraph, or page numbers, if needed to reflect changes in section, paragraph, or page numbers that result from adding, modifying, or deleting certain language in accordance with another authorized change.

5. Lenders MAY add the words "Purchase Money" in front of or above the caption "Mortgage", if all, or any portion of the loan proceeds are to be used to purchase the security property. Lenders MAY also add the following in parentheses either above the caption or in the space provided for the legal description of the property:

(All or part of the purchase price of the Property is paid for with the money loaned.)

6. Lenders MAY name MERS as the mortgagee of record (as nominee for the beneficiary) in this document and, if they do, MUST make the following changes:

- (a) Insert a new definition (C), which reads as follows:

(C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

- (b) Redesignate the definition of "Lender" as (D) and delete the last sentence of the definition. Then redesignate all subsequent definitions (as E, F, G, etc.) as required.

- (c) Delete from the second sentence of the first paragraph of the section titled "TRANSFER OF RIGHTS IN THE PROPERTY" the words "For this purpose, Borrower does hereby mortgage, warrant, grant and convey to Lender and Lender's successors and assigns,..." and replace them with the following words:

For this purpose, Borrower does hereby mortgage, warrant, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS,...

- (d) Revise the paragraph of the section titled "TRANSFER OF RIGHTS IN THE PROPERTY" that begins with the words "TOGETHER WITH all the improvements..." by adding the following sentence at the end of the paragraph:

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

7. Lenders MUST add the following language (as a rider or as the second sentence of the last paragraph in Section 9), if the mortgage is secured by a leasehold estate, but lenders MAY add this language if the mortgage is not secured by a leasehold estate:

Borrower shall not surrender the leasehold estate and interests herein conveyed or terminate or cancel the ground lease. Borrower shall not, without the express written consent of Lender, alter or amend the ground lease.

8. Lenders MAY add to Definition (G). Riders a check-off box for "VA Rider", if they use this document for a VA-guaranteed mortgage that will be delivered to us and such a rider is required to add VA's assumability feature (which overrides the "acceleration" clause in this document).
9. Lenders MAY preprint this document with County embedded in that portion of the section of the document titled TRANSFER OF RIGHTS IN THE PROPERTY that requires entry of the Type of Recording Jurisdiction, if all mortgage recordings in the state take place at the county level. In such cases, the words [Type of Recording Jurisdiction] do not have to appear beneath the word County. In addition, if documents are prepared on a transaction-by-transaction basis and the Name of Recording Jurisdiction is typed in when the document is prepared, the words [Name of Recording Jurisdiction] do not have to appear beneath the actual name of the recording jurisdiction.
10. Lenders MAY delete the word "Witnesses" and the two accompanying lines for witness signatures that appear to the left of the Borrower signature lines on Page 16. If a borrower signs the document in Michigan, lenders MUST have the borrower's execution of this document notarized and, in such cases, MUST add any acknowledgment and notary statement necessary to comply with applicable Michigan law.
11. Lenders MAY delete from the last sentence of the next-to-last paragraph that precedes the Uniform Covenants section the word "generally" and replace it with the word "specially", if the security property is located in an area in which security instruments normally provide for a special warranty of title by the borrower (rather than a general warranty).
12. Lenders MAY add an asterisk (*) following the applicable borrower's name in Definition (B). Borrower on Page 1 and following the applicable borrower's signature on the last page of the document and then insert the following legend immediately after the execution block on this page, if a borrower is signing the document for the sole purpose of waiving dower rights:

* _____ signs as Borrower solely for the purpose of waiving dower rights without personal obligation for payment of any sums secured by this Security Instrument.

13. Lenders may insert a Notice on the Security Instrument if the Notice is required by applicable law for the type of transaction.

Other Pertinent Information

Any special instructions related to preparation of this document, use of special signature forms, required riders or addenda, etc. are discussed below.

1. If the borrower is an *inter vivos* revocable trust, we may require: a special rider, a different signature form for the trustee signature, and a special signature acknowledgment for the settlor/credit applicant(s). Lenders are responsible for making any modifications, including the use of different terminology, needed to conform to the signature forms customarily used in Michigan and will be held fully accountable for the use of any invalid signature form(s).

- Each of the trustees must sign this document in a signature block substantially similar to the following, which should be inserted in the Borrower signature lines.

_____, Trustee of the _____ Trust
under trust instrument dated _____, for the benefit of
_____ (Borrower).

- Each settlor of the trust who is a credit applicant must sign a signature acknowledgment in a signature block substantially similar to the following, which should be inserted following the Borrower signature lines:

BY SIGNING BELOW, the undersigned, Settlor(s) of the _____ Trust
under trust instrument dated _____, for the benefit of
_____, acknowledges all of the terms and covenants
contained in this Security Instrument and any rider(s) thereto and agrees to be bound
thereby.

Trust Settlor (SEAL)